

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION**

UNITED STATES OF AMERICA)

Case No. 2:99CR10052-2

v.)

OPINION

IRA STANFORD MULLINS, JR.,)

By: James P. Jones

United States District Judge

Defendant.)

Jennifer R. Bockhorst, Assistant United States Attorney, Abingdon, Virginia for United States; Nancy C. Dickenson, Assistant Federal Public Defender, Abingdon, Virginia, for Defendant.

The defendant, Ira Stanford Mullins, Jr., has filed an authorized successive Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255, arguing that his sentence imposed in 2000 as a career offender is unlawful. I stayed his case pending resolution by the United States Court of Appeals for the Fourth Circuit of *United States v. Brown*, which has now been decided.¹ 868 F.3d 297 (4th Cir. 2017). After consideration of the record and applicable case law, I conclude that Mullins' motion must be dismissed as untimely.

On January 4, 2000, Mullins pleaded guilty to bank robbery, in violation of 18 U.S.C. §§ 2 and 2113(a). Mullins' Presentence Investigation Report ("PSR") recommended that he receive an increased sentence because he qualified as a

¹ Brown filed a petition for rehearing and rehearing en banc following the panel decision. *United States v. Brown*, 16-7056 (4th Cir. Oct. 5, 2017). The Fourth Circuit denied the petition on February 26, 2018.

career offender in that he had “at least two prior felony convictions of either a crime of violence or a controlled substance offense,” pursuant to U. S. Sentencing Commission Guidelines Manual (“USSG”) § 4B1.1 (1999). PSR ¶ 46, ECF No. 43. The predicate offenses supporting his status as a career offender included three prior Georgia convictions for burglary, and a Georgia conviction for aggravated assault with intent to rob. *Id.* ¶¶ 80 - 83. On March 24, 2000, I sentenced Mullins to a total of 240 months’ incarceration and three years of supervised release, after concluding that he was a career offender. Mullins did not appeal. Mullins was released from prison on December 21, 2016. He is currently serving his three-year term of supervised release, and thus his § 2255 motion is not moot. *United States v. Pregent*, 190 F.3d 279, 283 (4th Cir. 1999) (noting that a defendant on supervised release is considered to be in custody for purposes of a § 2255 motion).

In this § 2255 Motion, Mullins challenges the constitutionality of USSG § 4B1.2(a), which at the time of his sentencing defined a “crime of violence,” in part, as an offense that “otherwise involves conduct that presents a serious potential risk of physical injury to another,” referred to as the “residual clause.” He bases his argument on *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015), in which the Supreme Court held that an identically worded residual clause in a federal statute, 18 U.S.C. § 924(e)(2)(B), was unconstitutionally vague and could not be used to

increase a defendant's sentence. However, Mullins' argument that his crime of violence convictions no longer support his career offender status because the residual clause in the Guidelines is unconstitutional, is foreclosed by *Beckles v. United States*, 137 S. Ct. 886 (2017). The Supreme Court held that the Guidelines are not subject to a similar constitutional challenge as they merely "guide the exercise of a court's discretion" and do not "fix the permissible range of sentences" that a defendant faces. *Id.* at 892.

Nonetheless, Mullins argues that the determination that he qualified as a career offender is governed by *Johnson*, not *Beckles*. I sentenced Mullins in 2000, under the pre-*Booker* mandatory Guideline scheme. *United States v. Booker*, 543 U.S. 220, 245 (2005) (holding, in order to avoid a constitutional violation, that the Sentencing Guidelines are advisory and not mandatory). Accordingly, he argues that the mandatory Guidelines, which fixed his sentencing range, acted as the functional equivalent of a statutorily imposed sentence, and as a result, the reasoning of *Johnson* applies. Suppl. Mem. Supp. § 2255 Mot. 4-5, ECF No. 82.

The *Beckles* court did not address whether a constitutional infirmity might arise in circumstances where a defendant was sentenced under the mandatory Guidelines regime that existed prior to *Booker*. The Fourth Circuit, in *Brown*, was faced with just such a situation, and ultimately concluded that the defendant was

not entitled to relief because on collateral review, he could not overcome the stringent timeliness hurdle required by 28 U.S.C. § 2255. *Brown*, 868 F.3d at 299.

Usually, a defendant must file a motion under § 2255 within one year from the date on which the defendant's judgment became final. 28 U.S.C. § 2255(f)(1). However, the statute allows for an additional one-year period to run when a defendant relies on a rule of constitutional law newly recognized by the Supreme Court, starting from "the date on which the right asserted was initially recognized by the Supreme Court." *Id.* § 2255(f)(3). The *Brown* court concluded that in neither *Johnson* nor *Beckles* had the Supreme Court expressly recognized the right of a defendant to obtain relief who was sentenced as a career offender under a mandatory Guideline regime. 868 F.3d at 302. By leaving open that question, the Supreme Court failed to recognize a new right in the mandatory Sentencing Guidelines context. *Id.* Accordingly, a defendant sentenced as a career offender under the mandatory Guidelines could not rely on the additional one-year limitations period in § 2255(f)(3). *Id.*

Because Mullins did not file this § 2255 petition until 2016, 16 years after his judgment became final, the petition is time barred and must be dismissed. *Id.* at 304.

A separate Final Order will be entered forthwith.

DATED: April 26, 2018

/s/ James P. Jones
United States District Judge